



OFFICE of the ATTORNEY GENERAL
GREG ABBOTT

May 29, 2003

Ms. Angela G. Bishop
Feldman & Rogers, L.L.P.
5718 Westheimer, Suite 1200
Houston, Texas 77057

OR2003-3619

Dear Ms. Bishop:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 181993.

The Clear Creek Independent School District (the "district"), which you represent, received a request for (1) all documents relating to the district's formal or informal policies for disciplining students with disabilities; (2) a bill for attorney's fees; (3) all information pertaining to district self-evaluations regarding Section 504 and IDEA; and (4) all evaluations or reviews conducted by any other entity regarding Section 504 or IDEA. You state that the district has released the requested attorney fee bill. You claim that other responsive information is protected by the attorney-client privilege under Texas Rule of Evidence 503. We have considered your arguments and have reviewed the information you submitted. We assume that the district has released any other information that is responsive to this request, to the extent that such information existed when the district received this request. If not, then the district must do so at this time. *See* Gov't Code §§ 552.301, .302; Open Records Decision No. 664 (2000). Chapter 552 of the Government Code does not require the district to release information that did not exist when it received this request or to create responsive information. *See Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983).

The district seeks to withhold the submitted information under Texas Rule of Evidence 503. Generally, this office does not address the applicability of discovery and evidentiary rules to information that a governmental body seeks to withhold from the public under chapter 552 of the Government Code. *See* Gov't Code § 552.005(a) (Gov't Code § 552.005(a) does not affect scope of civil discovery under Texas Rules of Civil Procedure); Open Records Decision Nos. 551 at 4 (1990) (fundamental purposes of Gov't Code ch. 552 and of discovery provisions differ), 416 at 7 (1984) (what information can or cannot be introduced

during trial and what information can or cannot be released to public under Gov't Code ch. 552 are two entirely different issues). The Texas Supreme Court has held that "[t]he Texas Rules of Civil Procedure and Texas Rules of Evidence are 'other law' within the meaning of section 552.022 [of the Government Code]." *See In re City of Georgetown*, 53 S.W.3d 328 (Tex. 2001). In this instance, however, the submitted information does not fall within one of the eighteen categories of information that are subject to section 552.022. As the information at issue is not subject to section 552.022, the district may not withhold that information from the requestor under Texas Rule of Evidence 503.

We note, however, that section 552.107(1) of the Government Code protects information that comes within the attorney-client privilege. Thus, we will consider whether the submitted information is excepted from disclosure under section 552.107(1). When asserting the attorney-client privilege under this exception, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. *See Open Records Decision No. 676 at 6-7 (2002)*. First, a governmental body must demonstrate that the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made "for the purpose of facilitating the rendition of professional legal services" to the client governmental body. *See TEX. R. EVID. 503(b)(1)*. The privilege does not apply when an attorney or representative is involved in some capacity other than that of providing or facilitating professional legal services to the client governmental body. *See In re Texas Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney acting in capacity other than that of attorney). Governmental attorneys often act in capacities other than that of professional legal counsel, such as administrators, investigators, or managers. Thus, the mere fact that a communication involves an attorney for the government does not demonstrate this element. Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. *See TEX. R. EVID. 503(b)(1)(A), (B), (C), (D), (E)*. Thus, a governmental body must inform this office of the identities and capacities of the individuals to whom each communication at issue has been made. Lastly, the attorney-client privilege applies only to a *confidential* communication, *id.* 503(b)(1), meaning it was "not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication." *Id.* 503(a)(5). Whether a communication meets this definition depends on the *intent* of the parties involved at the time the information was communicated. *See Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, no writ). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain that the confidentiality of a communication has been maintained. Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege unless otherwise waived by the governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

You state that the information submitted as Exhibit B was prepared at the request of the district by one of its attorneys. You also inform us that this information was communicated to client representatives of the district in connection with the rendition of legal services. You also state that this information was intended solely for use by district employees and has not been released to parents or community members. Based on your representations and our review of the information submitted as Exhibit B, we find that you have demonstrated that section 552.107(1) is applicable to this information. Therefore, Exhibit B is excepted from disclosure under section 552.107 of the Government Code.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

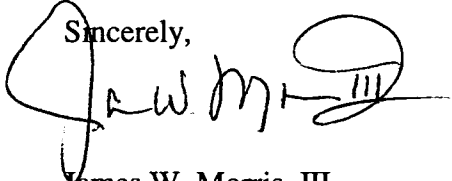
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be

sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read 'J W Morris III', written over the word 'Sincerely,'.

James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/sdk

Ref: ID# 181993

Enc: Submitted documents

c: Mr. Al Corona
14918 Saint Cloud Drive
Houston, Texas 77062
(w/o enclosures)